FILED
JUL 12 1940
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 233

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JAMES B. BERRY SONS' COMPANY, INC.,
Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
a corporation, Lessee of Michigan Central Railroad,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

JOHN L. NESBIT,
Franklin, Pa.,

J. VILLARD FRAMPTON,
J. H. COURTNEY,
Oil City, Pa.,

Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

JAMES B. BERRY SONS' COMPANY, INC.,
Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
a corporation, Lessee of Michigan Central Railroad,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of James B. Berry Sons' Company, Inc., a corporation of Pennsylvania, respectfully represents:

A. Question Presented.

The essential question is whether a carrier by railroad delivering freight consigned for interstate transportation upon a uniform domestic through bill of lading, issued by another carrier by railroad, may deliver freight so trans-

ported and relinquish possession thereof at destination to the consignee upon an extension of credit for the accrued charges thereon contrary to and in violation of the law as declared in Sec. 3, par. (2) of the Interstate Commerce Act (49 U. S. C. A. 3 (2)), and the rule of the Interstate Commerce Commission known as Order *Ex Parte* No. 73 (R. 342 a), prescribed under said Act, to govern the delivery or relinquishment of possession of freight at destination without prior payment of such charges and thereafter lawfully recover from the shipper the freight charges for which credit was extended.

Judgment entered on the verdict of a jury in favor of petitioner, the shipper, on this issue was reversed by the Supreme Court of Pennsylvania, with instructions to enter judgment for respondent in the sum of $9,569.60, with interest (R. 356).

The pertinent portion of the Interstate Commerce Act and a summary of Order *Ex Parte* No. 73 are as follows:

Interstate Commerce Act, Sec. 3, par. (2), entitled, "Payment of freight as prerequisite to delivery", provides:

> "No carrier by railroad * * * shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination. * * *"

Order *Ex Parte* No. 73, prescribed by the Interstate Commerce Commission pursuant to Sec. 3, par. (2) above quoted, provides that— The carrier, upon taking precau-

tions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges for a period of 48 hours, and that where retention or possession of freight by the carrier until the charges thereon are paid will retard prompt delivery or prompt release of equipment or facilities, the carrier, taking like precautions may relinquish possession of freight in advance of such payment and may extend credit in the amount of such charges for a period of 96 hours. (See Appendix to accompanying Brief or R. 342 a.)

B. Summary Statement of the Matter Involved.

In the month of October, 1932 petitioner, designated as shipper therein, executed thirty bills of lading issued by the Texas-Mexican Railway Company at Laredo and other points of origin, in the state of Texas, for the transportation by railroad over its road and roads of other carriers on the route to destination of 30 tank cars of crude petroleum consigned to Simrall Refining Corporation at Amherstburg, Ontario, Canada (R. 25 a-30 a). Each tank car was received enroute by respondent at Joliet, Illinois, for transportation thence to destination (R. 27 a).

Each tank car was delivered by respondent to consignee at destination without prior payment of the accrued freight charges and upon credit for said freight charges in an amount and a manner contrary to Order *Ex Parte* No. 73 (R. 305 a, 306 a, 307 a). The consignee thereafter failed to make payment and respondent, having neglected to ultimately collect such freight charges, brought suit therefor (assumpsit) against petitioner in the Court of Common Pleas of Venango County, Pennsylvania (R. 19 a).

By affidavit of defense (R. 64 a) petitioner denied that the tank cars were transported and delivered in accordance with the contracts of shipment and the law and regulation of said Interstate Commerce Commission governing the delivery of freight at destination. Petitioner further alleged that, contrary to the terms of said contracts for the transportation of said cars and in violation of law, the delivery of said cars was made and the possession thereof relinquished to the consignee without the payment of the rates and charges accrued and upon unlawful extensions of credit to the consignee, without knowledge or consent of petition. That undue or unreasonable preference or advantage was given to the consignee in breach and violation of each contract of shipment. That petitioner was not liable and that recovery against it could not be maintained (R. 64 a-77 a). This was in issue at trial.

At trial it was proven without contradiction that respondent relinquished possession of each car at destination without payment by consignee of the accrued freight charges and upon credit contrary to Order *Ex Parte* No. 73 and that the delivery made on the credit extended to consignee was on the basis of a stated sum of $15,000 for a period of seven days or upwards not to exceed two weeks, depending upon the date upon which the respondent relinquished possession of the freight, and was in the nature of a credit for arrivals during one week to extend through all of the next following week (R. 150 a, 153 a, 244 a, 246 a, 265 a). Order *Ex Parte* No. 73 was the only regulation in evidence governing and controlling the delivery of freight by a carrier in advance of the payment of the charges thereon (R. 307 a, 342 a).

The trial court affirmed petitioner's first request for charge that the contracts of shipment, containing no pro-

vision to the contrary, were contracts according to the laws of the United States and the rules of the Interstate Commerce Commission, and that if the jury find the tank cars were delivered to consignee at destination and possession of the carrier was relinquished without payment of the rates and charges and a credit extended to consignee not in accordance with Order *Ex Parte* No. 73 then the jury may find the contracts for the transportation of the tank cars were breached and may render verdict for defendant (now petitioner) (R. 322 a). The jury rendered verdict for petitioner (R. 324 a).

Upon judgment entered on the verdict (R. 344 a) respondent appealed to the Supreme Court of Pennsylvania. The petitioner in its brief in the Supreme Court of Pennsylvania, seeking to more clearly present such extension of credit in defense of the action as a question involved in the appeal, made a counter statement of the question for consideration by the Supreme Court of Pennsylvania, as follows:

> Defendant denied transportation and delivery of oil in accordance with contracts of shipment and proved without contradiction that delivery of oil to consignee on credit was not made according to contracts and was contrary to method of credit authorized by Interstate Commerce Commission *Ex Parte* Order No. 73 which was the only authority for credit in evidence. Might jury find from evidence that contracts were breached?

The Supreme Court of Pennsylvania in its opinion (R. 351; par. 3, R. 356) denied the right specially set up and claimed by the petitioner under the "Interstate Commerce Act," 49 U. S. C. A., Sec. 3, Par. (2), and under the promulgation (Order *Ex Parte* No. 73) of the Interstate Com-

merce Commission made pursuant to the direction of Congress in relation to the "payment of freight as prerequisite to delivery." It held that petitioner was liable under the provisions of Section 7 (R. 29 a) of the shipping contract because petitioner, as shipper thereunder, had failed to sign the statement which it might have signed directing that the carrier shall not make delivery without payment of freight and all other lawful charges (R. 28 a) and by so holding denied and rejected the right set up and claimed and drawn into question by petitioner upon the section of the Interstate Commerce Act mentioned and Order *Ex Parte* No. 73, in disregard of the uncontradicted proofs and finding of the jury that respondent had made delivery of the tank cars to consignee at destination upon credit contrary to the bills of lading and in violation of the law and applicable order of the Interstate Commerce Commission controlling such delivery.

C. Reasons Relied on for the Allowance of the Writ.

1. The question presented is a Federal question of substance and public importance and in so far as counsel is advised has not been determined by this court or any other court and the decision now sought to be reviewed seems to be not in accord with the law as enacted by Congress and the applicable decisions of this court declaring the law as to railroad carriers and bills of lading issued for the transportation of freight by railroad.

2. Denial and rejection by the Supreme Court of Pennsylvania of the right specifically set up and claimed by petitioner under the Interstate Commerce Act, U. S. C. A. Title 49, Sec. 3, par. (2), (a statute of the United States) and under the order of the Interstate Commerce Commission, Order *Ex Parte* No. 73, in force and promulgated pur-

suant to the direction of Congress in said statute, and refusal of said Court to apply the law thus prescribed relating to the payment of freight as prerequisite to delivery in a case calling for its application, in contravention of the right of petitioner and of public policy and general welfare.

3. The Supreme Court of Pennsylvania by its rejection of, and refusal to make application of, an applicable statute of the United States (*supra*) and Order of the Interstate Commerce Commission (*supra*) has decided an important question of general law governing carriers by railroad in conflict with said statute and Order.

4. The decision of the Supreme Court of Pennsylvania denies and rejects the effect upon, and application to, the issue at bar of a statute of the United States *(supra)* and an Order of the Interstate Commerce Commission promulgated thereon (*supra*) and is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of review.

5. The decision of the Supreme Court of Pennsylvania approves and confirms the uncontradicted and deliberate violation by a railroad carrier of the mandate of a statute of the United States (*supra*) and Order of the Interstate Commerce Commission promulgated thereon (*supra*) and that decision should be reviewed and the law be thereby determined in relation to carriers by railroad.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court directed to the Supreme Court of Pennsylvania to review the final judgment or decree rendered and passed

by the Supreme Court of Pennsylvania in this cause entitled, The New York Central Railroad Company, a corporation, Lessee of Michigan Central Railroad vs. James B. Berry Sons' Company, Inc., No. 55 March Term, 1940, on appeal from the judgment of the Court of Common Pleas of Venango County, Pennsylvania, at No. 96 November Term, 1935.

JAMES B. BERRY SONS' COMPANY, INC.
By JOHN L. NESBIT,
J. VILLARD FRAMPTON,
J. H. COURTNEY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinion of the Court Below.

The opinion of the Supreme Court of Pennsylvania, reversing the judgment which was entered on a verdict rendered by a jury for petitioner, has not been reported in the Pennsylvania State Reports but is reported in Atlantic Reporter, 12 A. 2d 588 and appears at R. 351. The opinion was filed April 15, 1940. Petition for reargument and for vacation of the order of reversal was filed with the Supreme Court of Pennsylvania and was denied on May 6, 1940 (R. 356).

II. Jurisdiction.

1. *Statutory provisions believed to sustain jurisdiction.*

The petitioner invokes the jurisdiction of this court under Section 237 (b), as amended by the Act of February 13, 1925, of the Judicial Code, C. 229, Sec. 1, 43 Stat. 937, (28 U. S. C. A. Sec. 344).

2. *Statute of United States which is involved.*

The right or privilege so denied and rejected was specifically set up and claimed in the case at bar by petitioner as a defense under Sec. 3, par. (1) and par. (2) of the Interstate Commerce Act (49 U. S. C. A. Sec. 3) as amended August 12, 1935, C. 509, 49 Stat. 607, and March 4, 1927, C. 510, Sec. 1, 44 Stat. 1447, respectively, and the rule or order, known as Order *Ex Parte* No. 73, prescribed by the Interstate Commerce Commission of the United States, 171 I. C. C. 268, which govern the settlement of tariff rates and

charges on freight transported by railroad carriers to prevent unjust discrimination.

III. Statement of the Case.

A statement of this case appears under the heading "Summary Statement of the Matter Involved" in the foregoing petition, and, in the interest of brevity, is not here repeated.

IV. Specification of Errors.

1. The Supreme Court of Pennsylvania erred in reversing the judgment entered by the Court of Common Pleas of Venango County, Pa., upon the verdict of a jury in favor of petitioner, and in instructing judgment for freight charges to be entered for respondent in the amount of $9,569.60, with interest from November 3, 1932 (R. 356).

2. The Supreme Court of Pennsylvania erred in denying and rejecting the right and privilege specially set up and claimed by petitioner under the Interstate Commerce Act, Sec. 3, par. (1) and par. (2), and Order *Ex Parte* No. 73 prescribed by the Interstate Commerce Commission in accordance with said statute to govern the settlement of tariff rates and charges and prevent unjust discrimination.

3. The Supreme Court of Pennsylvania erred in its refusal to apply the law prescribed in the Interstate Commerce Act and the Order of the Interstate Commerce Commission, Order *Ex Parte* No. 73, relating to the payment of freight as a prerequisite to delivery in the case at bar which called for the application thereof.

4. The Supreme Court of Pennsylvania erred, under the uncontradicted proof of the violation by respondent of the law of the case in extending credit to consignee, by holding that petitioner was liable under Section 7 of the shipping contracts because of the failure to sign the stipulation in relief of that liability.

V. Summary of Argument.

1. The issue in the case at bar called for the application of the law, Sec. 3, par. (1) and par. (2) of the Interstate Commerce Act, and Order *Ex Parte* No. 73 of the Interstate Commerce Commission, issued pursuant thereto, to govern carriers by railroad when making delivery of freight at destination upon credit in lieu of payment of accrued tariff charges as a prerequisite to delivery.

2. The judgment entered on the verdict rendered by the jury upon this issue in favor of the petitioner was warranted and was erroneously reversed, on the theory that the petitioner, as shipper, was liable because it had not invoked the benefits of the stipulation under Section 7 of the bill of lading, despite the extension of credit to consignee by respondent contrary to the law prescribed to govern the shipments.

VI. Argument.

Petitioner believes the question presented is of such public interest and arises upon a Statute of the United States and so vitally affects and relates to the transportation of freight in interstate commerce by railroad carriers under such Statute, that presentation thereof for consideration and determination by this Honorable Court is called for in respect of the public policy declared by the Congress.

1. The issue in the case at bar called for the application of the law, Sec. 3, par. (1) and par. (2) of the Interstate Commerce Act, and Order *Ex Parte* No. 73 of the Interstate Commerce Commission, issued pursuant thereto, to govern carriers by railroad when making delivery of freight at destination upon credit in lieu of payment of accrued tariff charges as a prerequisite to delivery.

It is *uncontradicted* that possession of the cars was relinquished at destination by respondent to the consignee without the prior payment of the accrued freight charges and upon credit in a manner contrary to the Interstate Commerce Commission Order *Ex Parte* No. 73, which was introduced in evidence by petitioner as Exhibit B (342 a). This was the only evidence governing and controlling the delivery of freight in advance of the payment of the tariff charges. Delivery of the cars was made to consignee on a credit which not only was in violation of and contrary to Order *Ex Parte* No. 73 (305 a, 306 a, 307 a) but was in a stated sum for a period of 7 days or upwards not in excess of 2 weeks depending upon the date on which possession of the cars was relinquished, being in the nature of a credit for arrivals during one week to extend through all of the next following week (150 a, 153 a, 244 a, 246 a, 265 a). There was *no proof* in the case whatever that the credit extended conformed to any regulation in force.

The result under the decision sought to be reviewed is that the law binds the shipper to the strictest measure, but the carrier may make delivery of freight to a consignee upon credit in disregard of the law and in breach of the contract of shipment and may nevertheless thereafter recover from the shipper the charges for which such credit was extended and which the carrier does not finally collect from

consignee. If a railroad carrier justly stands in this position at law, then it stands in a different position from any other person to a contract.

Order *Ex Parte* No. 73 is made for the benefit of the carrier. Under it no consignee has any right to credit for freight charges. The Commission has no power to order any carrier to positively extend credit to a consignee. Under Order *Ex Parte* No. 73 the carrier may extend credit for 48 or 96 hours as therein indicated upon each shipment of freight transported, (R. 342 a) but the rule goes no further and does not permit of credit for a longer period or in a stated sum or any amount greater than the charges on each shipment, hence its true application in the case at bar and the erroneous rejection thereof by the Supreme Court of Pennsylvania.

Under the Interstate Commerce Act, as amended, C. 208, 46 Stat. 251 (49 U. S. C. A., Sec. 20, par. 11) every railroad in interstate commerce receiving property for transportation from any point in the United States to a point in an adjacent foreign country is required to issue a receipt or bill of lading and is liable for all loss, damage or injury to such property from its point of origin to its destination when transported on a through bill of lading. The contracts of shipment made in this case with the initial carrier (The Texas-Mexican Railway Company) were through contracts of shipment (R. 26 a). Order *Ex Parte* No. 73 became a part and the law of each of these contracts. Each was an entire contract governing the entire transportation and fixing the obligation of all connecting carriers. The several carriers are not independent parties to the contract but are merely agents of the carrier with whom the contract was made and it is the

duty of these connecting carriers to forward the goods in accordance with the contract and they are prevented by law from varying the terms of the contract. Cudhay Packing Co. v. Bixby, 205 S. W. 865, 248 U. S. 577; Freedman v. Erie R. R. Co., 246 Ill. App. 479; Lewis Poultry v. N. Y. C. R. Co., 105 A. 109; A. C. L. R. Co. v. Riverside Mills, 219 U. S. 186; T. & P. Rwy. Co. v. Leatherwoods, 250 U. S. 479; M. K. & T. R. Co. v. Ward, 244 U. S. 383.

Despite the law as declared respondent deliberately varied the terms of each contract of shipment and violated and breached each contract of shipment by making unto itself and the consignee a law for the delivery of the tank cars on credit wholly contrary to Order *Ex Parte* No. 73, without knowledge of, or consent or approval by, the petitioner who made each contract with a railroad of which respondent was a mere agent and bound to performance accordingly. Respondent operates its railroad interstate, within the United States as well as in Canada, and received each tank car at Joliet, Ill., for transportation thence to destination. It was bound by every provision in each contract of shipment and the law thereof and could not escape compliance with the contract which embraced Order *Ex Parte* No. 73. B. & O. R. Co. v. Domestic Hardwoods, 65 F. (2d) 488; Richardson & Sons v. The Burlington, 1931 Can. S. C. R. 76; Suzuki v. Cent. Argentino Ry., 27 F. (2d) 795; Great No. Ry. Co. v. Sullivan, 294 U. S. 458.

In B. & O. R. R. Co. v. Domestic Hardwoods, *supra*, it was held Jones' Tariff was applicable to a shipment from North Carolina into Canada and that the carrier operating in United States and Canada and receiving goods in the United States for transportation to Canada was subject to our laws.

In Richardson & Sons v. The Burlington (*supra*) the law of the United States, the place of contract and initial transportation was held to be applicable.

Petitioner could make no other contract of shipment than one embracing Order *Ex Parte* No. 73 and the respondent had no power to make any contract with the consignee for delivery of the cars on credit contrary thereto. This was the basis upon which petitioner contracted for an extension of credit by respondent to the consignee, if credit were to be extended.

If the carrier, as in the case at bar, is not bound by the contract of shipment and the law of that contract, and can substantially breach the same by wilfully extending credit to a consignee to the contrary, then the contract and the law regulating credit is to be cast aside in the face of the express mandate of Congress. A rule of action which permits or sanctions such result and denies to a shipper, as in the case at bar, the right of defense upon such breach seems unreasonable and untenable.

The Supreme Court of Pennsylvania by its decision erroneously denied and rejected the rights of petitioner claimed under the law of the case and by reversal of the judgment entered on the verdict of a jury not alone penalized petitioner for the unlawful conduct of respondent but affirmed the violation of law by respondent from such conduct, and rested its decision upon this aspect of the case on the point next discussed (R. 356).

2. The judgment entered on the verdict rendered by the jury upon this issue in favor of the petitioner was warranted and was erroneously reversed, on the theory that

the petitioner, as shipper, was liable because it had not invoked the benefits of the stipulation, under Section 7 of the bill of lading, despite the extension of credit to consignee by respondent contrary to the law prescribed to govern the shipments.

The failure of petitioner to sign the stipulation available under Section 7 of the shipping contract should not justly be construed to deprive the shipper of a right of defense which arises from a substantial breach of the contract of carriage. By failure to sign the stipulation, when considered in connection with Order *Ex Parte* No. 73, the shipper takes the risk of nonpayment of freight charges if and when, and only if and when, the carrier relinquishes possession at destination of the freight in accordance with Order *Ex Parte* No. 73. The liability of a shipper, as in the case at bar, for freight charges arises upon the contract of shipment and performance thereof by the carrier according to law. Each are bound alike and, whether or not the stipulation is signed, there is no absolute and unqualified liability upon such shipper under the contract. L. & N. R. R. Co. v. Central Iron & Coal Co., 265 U. S. 59.

Failure of petitioner to take advantage of Section 7 was not of itself a sufficient answer as was held as if petitioner was contending *only* that the respondent granted the consignee an *unreasonable credit period*. The question was not one of an unreasonable credit but was one of unlawful credit upon an absolute violation of the rule of law prescribing and limiting the only credit which could be extended in performance of each contract of shipment.

Failure of petitioner to invoke Section 7 did not remove or invalidate Order *Ex Parte* No. 73 as the governing law,

and leave respondent as its own law maker on the subject of credit. It is uncontradicted, nevertheless, that respondent did make its own law for extending credit. Having done so unreasonable preference or advantage was given to consignee and petitioner was subjected to undue and reasonable prejudice or disadvantage and to unjust discrimination, all of which the Interstate Commerce Act, including Order *Ex Parte* No. 73 prescribed thereunder, expressly prohibits. (U. S. C. A. Title 49, Sec. 3, pars. (1) and (2).)

This question calls for consideration by this Honorable Court of the effect of the deliberate breach of each shipping contract by a violation of the applicable law and Order *Ex Parte* No. 73, in making delivery of the cars at destination to the consignee upon credit contrary to the contract of shipment, embracing Order *Ex Parte* No. 73. Petitioner as shipper made no contract for credit such as extended by respondent. The failure to sign the stipulation under Section 7 is not the answer to this question. The verdict of the jury for petitioner must be taken to mean that the jury found as a fact, and in accordance with petitioner's first point for charge (R. 322 a) upon uncontradicated proof that the cars of oil were delivered to consignee at destination and the possession of respondent was relinquished without payment of the tariff rates and charges thereon and credit extended to the consignee not in accordance with the contract and the law thereof and that the contracts were thereby breached.

The decision of the Supreme Court of Pennsylvania is in express conflict with the declared public policy and involves

a substantial question of Federal law governing carriers by railroad which ought to be here determined.

Respectfully submitted,

JOHN L. NESBIT,
Franklin, Pa.,

J. VILLARD FRAMPTON,
J. H. COURTNEY,
Oil City, Pa.,

Counsel for Petitioner.

APPENDIX.

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171 I. C. C. 268

ORDER

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 20th day of January, A. D. 1931

Ex Parte No. 73

In re Section 3 of the Interstate Commerce Act as Amended by Section 405 of the Transportation Act, 1920, and Act of March 4, 1927.

* * * * * *

* * * * * *

It is ordered, that the rules and regulations prescribed in the order of June 4, 1920, in the above-entitled proceeding be, and they are hereby, modified and that the following rules and regulations be, and they are hereby, prescribed to become effective March 10, 1931, and to remain in force and effect until further order of the commission.

The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as hereinafter set forth.

Where retention or possession of freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit period herein specified, may relinquish possession of the freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to shippers for a period of 96 hours to be computed as hereinafter set forth.

* * * * * *

FILED
AUG 5 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1940

No. 233

JAMES B. BERRY SONS' COMPANY, Inc.,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, Lessee of Michigan Central Railroad,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. DANHOF,
Detroit, Michigan.

A. R. OSBURN,
N. F. OSBURN,
Franklin, Pennsylvania,
Counsel for Respondent.

Murphy Printing Company, Law Printers, Detroit, Mich.
Form 27 Revised, Printed Under Supreme Court Rule No. 36

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. .....

JAMES B. BERRY SONS' COMPANY, INC.,
Petitioner

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation, Lessee of Michigan Central Railroad,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Notice of the filing of petition for writ of certiorari was served on counsel for respondent on July 15, 1940.

FINAL JUDGMENT

Final judgment was entered for respondent on May 8, 1940 by the Court of Common Pleas of Venango County, Pennsylvania for $9,569.08 with interest from November 2, 1932, the judgment for petitioner in the trial court having been reversed on appeal and the record remitted by the Supreme Court of Pennsylvania on May 7, 1940.

JURISDICTION OF THE COURT

This case involves the liability of a consignor who ships carload freight in interstate commerce by rail. The subject has been considered by this court and many state courts on numerous occasions. Title 49 U. S. C. A. Sec. 3, par. (2) Notes 2 and 3. The Supreme Court of Pennsylvania in reversing the judgment of the trial court stated and applied the principles announced in the decisions of this court (R. 351-356). The repetitious reasons for writ of certiorari, as set forth in petitioner's brief (pp. 6-7), are essentially the same, and present no federal question not foreclosed by prior decisions. The contention concerning credit is unsubstantial in character and devoid of merit. Under such circumstances, the petition should be denied. *Deming v. Carlisle Packing Co.*, (1912) 226 U. S. 102.

ARGUMENT

The petitioner shipped thirty carloads of oil by rail from points of origin in Texas, through the United States, to a destination in Ontario, Canada. The shipments moved under the uniform straight bill of lading prescribed by the Interstate Commerce Commission. The consignee became bankrupt before charges were paid. Suit was thereupon brought by delivering carrier to recover transportation charges from consignor.

Petitioner was permitted at the trial to advance to the jury, over objection of respondent, various confused theories of estoppel, negligence, election, and alleged violation of Commission regulations, as a defense to the action. The entire question of liability was submitted to the jury by the trial court. A verdict was returned for the petitioner, and judgment was entered thereon. On appeal to the Supreme Court of Pennsylvania, petitioner relied principally on alleged claims of failure of proof. These claims were decided adversely to the petitioner. The Supreme Court of Pennsylvania stated and applied the principles announced by this Court in *Louisville & Nashville Rr. Co. vs. Central Iron and Coal Co.*, (1924) 265 U. S. 59, and corrected the error of the jury and trial court (R. 353-356).

Petitioner here contends that the carrier is estopped from collecting charges because the consignee failed to pay within 48 to 96 hours after delivery, such being the time limited for consignees to pay charges in the United States by order of the In-

terstate Commerce Commission in *Ex Parte 73*, 51 I. C. C. 591, as modified 171 I. C. C. 268. Respondent asserted throughout the trial that this matter was immaterial. In discussing petitioner's claim the Supreme Court of Pennsylvania pointed out that "there is evidence that the regulations concerning delivery on credit in Canada differ from those in effect on this side of the boundary." (R. 356). This testimony, incidentally, was elicited by petitioner on the cross-examination of respondent's witnesses. (R. 131a, 134a). Thereafter petitioner endeavored at length to exclude it from the record. (R. 202a-204a).

The claim that *Ex Parte 73* applies to deliveries in Canada is predicated on a fallacious premise that the Interstate Commerce Commission may regulate the way in which common carriers should do business in Canada. The Commission has no power to do so. Title 49 U. S. C. A. Sec. 1 (2).

An extension of credit, even if made in the United States contrary to the Commission regulations, would not release a consignor who has assumed a primary liability for charges under its shipping contracts. *Western Maryland Ry. Co. v. Cross* (1924) 96 W. Va. 666, 123 S. E. 572. If it is assumed that *Ex Parte 73* is a part of the shipping contract, no agreement could then be made between carrier and consignee in derogation thereof. *Davis v. Henderson* (1924) 266 U. S. 92. Inasmuch as the credit regulations are designed in the public interest to secure the prompt payment of charges, the result for which petitioner here contends would not only defeat the very purpose of the regulations, but also open the door for granting preferences to consignors. It is well established that a carrier cannot by a departure from tariff provi-

sions, either intentionally or unintentionally, estop itself from collecting from a person who has assumed a legal liability for charges. *Pittsburgh, C. C. & St. L. Ry. Co. v. Fink* (1919) 250 U. S. 577, 583. The deliveries here, of course, were made in Canada under Canadian regulations.

In this case the state court has decided the question of liability in accordance with the decisions of this court. No grounds are stated for granting a writ of certiorari.

Respondent respectfully submits that the petition should be denied.

Respectfully submitted,
JOHN J. DANHOF,
Detroit, Michigan.

A. R. OSMER,
N. F. OSMER,
Franklin, Pennsylvania.
Counsel for Respondent.